

Exhibit 3

1 IN THE UNITED STATES DISTRICT COURT
2 IN AND FOR THE DISTRICT OF DELAWARE

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4 UNITED STATES OF AMERICA, : CRIMINAL ACTION
5 Plaintiff, :
6 v. :
7 NELSON LORA-PENA, :
8 Defendant. : NO. 05-47 (KAJ)

9 - - -
10 Wilmington, Delaware
11 Tuesday, December 20, 2005 at 3:17 p.m.
12 SENTENCING HEARING

13 BEFORE: HONORABLE **KENT A. JORDAN**, U.S.D.C.J.
14 - - -

15 APPEARANCES:

16
17 RICHARD ANDREWS, ESQ.
18 First Assistant United States Attorney
19 Counsel for Government

20 LAW OFFICES OF CHARLES PERUTO, JR.
21 BY: CHARLES PERUTO, JR., ESQ.
(Philadelphia, Pennsylvania)

22 Counsel for Defendant

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25 Brian P. Gaffigan
Registered Merit Reporter

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6 P R O C E E D I N G S

7 (REPORTER'S NOTE: The following sentencing
8 hearing was held in open court, commencing at 3:17 p.m.)

9 THE COURT: Good afternoon. Please be seated.

10 MR. ANDREWS: Good afternoon, Your Honor. This
11 is the time the Court has set for sentencing in the United
12 States vs. Nelson Lora-Pena, Criminal Action 05-47-KAJ.

13 Mr. Lora-Pena and his attorney, Mr. Peruto are
14 present in the courtroom. And at this time, we're prepared
15 to move forward with sentencing on that matter. Even though
16 I'm not sure there actually appears anything in the docket,
17 I also understand the Court might address the supervised
18 release violation that has been transferred from Rhode
19 Island and given a separate number, even though, based on my
20 discussions with Mr. Peruto, I'm not sure that it doesn't
21 make sense to postpone consideration of that until the Court
22 has sentenced him on the main charge and then see where
23 things stand.

24 THE COURT: All right. Well, Mr. Peruto, why
25 don't I have you come forward, please.

1 My understanding was that the Presentence and
2 Probation Office had been in touch with your colleague,
3 Mr. Driscoll. Have I got that correct?

4 MR. PERUTO: That's right.

5 THE COURT: I believe I have his name right.
6 And there had been some conversation about the supervised
7 release violation indicating that charge was not going to be
8 contested.

9 MR. PERUTO: It's not going to be. It's not
10 going to be, judge. It's a supervised release violation and
11 it speaks for itself.

12 THE COURT: Well, I agree, so I'm not sure
13 why we would postpone. Mr. Andrews, do you want to help
14 me out?

15 MR. ANDREWS: Your Honor, maybe I just
16 misunderstood the conversation I had with Mr. Peruto before
17 we got started.

18 THE COURT: Well, why don't we do this? It
19 makes sense to me, actually, to just take of that; okay?
20 Let's get that taken care of because you may have some
21 issues with the presentence report and discussion I'll have
22 on that. So let's deal with what is not contested at this
23 point. And for that purpose, I'm going to ask Mr. Lora-Pena
24 to come forward, if you would, please.

25 Hold on just a minute. Let me explain. You may

1 well understand already, Mr. Lora-Pena. Let me explain what
2 is going on. We have two things we have to deal with. You
3 were convicted of the charges that you were tried for in
4 this court but you also face a penalty associated with your
5 plea in Rhode Island and a supervised release violation
6 order that you be held to account for that was issued in
7 Rhode Island that was transferred down to this court by the
8 judge up there, to be addressed by me at the same time,
9 basically, as we're dealing with this. So I just need
10 to ascertain or make sure that if in fact you are not
11 contesting that you violated your supervised release up
12 there that the record is clear on that.

13 THE DEFENDANT: Yes, Your Honor. I admit to it,
14 that I violated my probation. I admit to it.

15 THE COURT: All right. Well, here is what I
16 need to do. I'm going to go ahead have the courtroom deputy
17 swear you in, ask a few questions in that regard and make a
18 record. All right?

19 (Defendant, NELSON LORA-PENA, placed under oath
20 at 3:07 p.m.)

21 THE COURT: All right. Now, the specific charge
22 here is that you violated condition two of your supervised
23 release by failing to report to the probation officer,
24 condition four of the supervised release by failing to make
25 child support payments as ordered, condition six by failing

1 to report a change of address, condition 11 by failing to
2 report a new arrest, and a violation of condition seven
3 regarding possession of a controlled substance. However,
4 the Probation Office has asked that we dismiss that
5 condition seven. So we're here talking about conditions
6 two, four, six and eleven. Do you understand what I just
7 said, sir?

8 THE DEFENDANT: Yes, Your Honor.

9 MR. PERUTO: If I could just interject here,
10 judge.

11 THE COURT: Sure.

12 MR. PERUTO: The defendant's wife was here
13 throughout the proceedings for the trial, and I can
14 represent to the Court that she was not pushing for the
15 child support enforcement in light of the fact that he had
16 sent her as much money as he could along the way. So he
17 was not prepared to admit -- I don't know if it's going to
18 make a great deal of difference -- admit on that condition
19 or on any cocaine charge, but the other charges he would
20 in fact be admitting to.

21 THE COURT: All right.

22 MR. PERUTO: I don't know if it will make any
23 difference.

24 THE COURT: All right. But as to condition two,
25 the failure to report to the probation officer; condition

1 11, failure to report an arrest; condition six, failure to
2 report a new address?

3 MR. PERUTO: It's admitted to.

4 THE COURT: Mr. Andrews, do you have any problem
5 with proceeding on those three and leaving the other two?

6 MR. ANDREWS: Your Honor, Mr. Selvaggi told me
7 before the hearing that he would be perfectly amenable
8 dropping the charge of the violation of condition number
9 four, also. So I'm perfectly happy to proceed on the basis
10 of those three admissions.

11 THE COURT: All right. Now, just real
12 quickly. I want you to understand that if you wanted to,
13 Mr. Lora-Pena, you could contest the facts here. In other
14 words, you don't have to admit to these violations. So I'm
15 going to ask you a few questions to make sure you understand
16 what your rights are and that you are knowingly --

17 THE DEFENDANT: Your Honor, excuse me. Can
18 you speak up a little? Because I got hearing problem, so
19 I can't hear clear what you say to me.

20 THE COURT: All right. Is that better for
21 you?

22 THE DEFENDANT: Yes. Thank you.

23 THE COURT: Okay. First, I want you to tell
24 me how far -- well, tell me how old you are today.

25 THE DEFENDANT: I'm 39.

1 THE COURT: When is your birthday?

2 THE DEFENDANT: August 2nd, 1966.

3 THE COURT: And how far did you go in school?

4 THE DEFENDANT: I graduated, 1985.

5 THE COURT: High school?

6 THE DEFENDANT: Yes.

7 THE COURT: Okay. Have you been hospitalized
8 or treated for any mental illness or addiction to drugs?

9 THE DEFENDANT: Yes, I did. When I was on
10 supervised release from my probation officer, he sent me
11 to --

12 THE COURT: Okay. Several years ago?

13 THE DEFENDANT: Yes.

14 THE COURT: Are you suffering from, today, from
15 any mental illness or addiction to drugs that you are aware
16 of?

17 THE DEFENDANT: You could say, yes. I'm sorry.
18 Yes, I am. I'm a drug addict, Your Honor.

19 THE COURT: All right. Are you under the
20 influence of drugs at this time?

21 THE DEFENDANT: No, sir.

22 THE COURT: All right. Are you under the
23 influence of any alcoholic beverage of any kind at this
24 time?

25 THE DEFENDANT: No, Your Honor.

1 THE COURT: And do you understand the purpose
2 of our discussion here is to establish whether or not you
3 violated supervised release and that that has some penalties
4 associated with it?

5 THE DEFENDANT: Yes, Your Honor.

6 THE COURT: Okay. Now, those three charges that
7 we're here talking about: condition number two, failure to
8 report to a probation officer; condition number six, failure
9 to report a change of address; and condition number eleven,
10 failure to report a new address. Do you understand that
11 those are the things that the Government is now arguing that
12 you should be held to account for violating on your previous
13 supervised release? Do you understand that?

14 THE DEFENDANT: Yes.

15 THE COURT: Are you satisfied with the
16 representation that Mr. Peruto has given you in the course
17 of the case you had here and any discussions you had with
18 him about the supervised release violation?

19 THE DEFENDANT: Yes.

20 THE COURT: And is your willingness to admit
21 or acknowledge that you violated your supervised release
22 something that you had an opportunity to discuss fully with
23 Mr. Peruto?

24 THE DEFENDANT: Yes. I mean I'll admit to that,
25 Your Honor.

1 THE COURT: Has anybody attempted to force you
2 to admit to this violation? Are you doing it of your own
3 free will?

4 THE DEFENDANT: I'm doing it of my own free
5 will.

6 THE COURT: Let me just ask you real quickly, if
7 I could. Mr. Andrews, if we had to go to a hearing on this,
8 how would you prove these violations?

9 MR. ANDREWS: Your Honor, I would call Probation
10 Officer John Selvaggi who has been in contact with Kurt
11 O'Sullivan who was the supervising U.S. Probation officer at
12 the time and who was familiar with the case, and basically
13 he would say what the records of the Probation Office up
14 there showed, combined with the fact Mr. Lora-Pena was
15 arrested here for being a fugitive for nine years last year
16 or earlier this year. And, more specifically, that he
17 basically dropped out of contact with the probation officer,
18 Probation Office there. January 5th, 1996 was the last time
19 that they saw him and he just dropped off the face of the
20 earth from that point forward.

21 THE COURT: All right.

22 Mr. Peruto, is there anything you want to
23 contest or argue with respect to that?

24 MR. PERUTO: No, sir. They are the facts.

25 THE COURT: All right. Now, then I'm going to

1 go ahead and make a finding based on a preponderance of the
2 evidence, including Mr. Lora-Pena's statement that in fact
3 he is guilty of those supervised release violations. I
4 heard you correct on that, didn't I, sir?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: That he is in violation of those
7 three conditions: numbers two, six and eleven, all of
8 which are classified as grade C violations pursuant to U.S.
9 sentencing guideline 7B1.1a3 and which then call for a term
10 of imprisonment of at least five months but no more than
11 11 months based on the criminal history category
12 Mr. Lora-Pena had at the time of that conviction.

13 Do you have any disagreement with that guideline
14 range, Mr. Peruto?

15 MR. PERUTO: I do not, sir.

16 THE COURT: Mr. Andrews?

17 MR. ANDREWS: No, Your Honor.

18 THE COURT: All right. Well, then we have
19 established that and we have established the guideline range
20 for that. We'll go ahead and talk about the right sentence
21 for that after we now deal with the guideline range
22 associated with the offense of conviction for which you were
23 tried in this Court, Mr. Lora-Pena; okay?

24 So at this point, let me just ask, do you have
25 any factual dispute or legal dispute, Mr. Peruto, with the

1 presentence report? And if we're going to have some legal
2 argument for awhile, I don't know, Mr. Peruto --

3 MR. PERUTO: You can sit down.

4 THE COURT: Okay. Why don't you go ahead and
5 have a seat, Mr. Lora-Pena, and I'll have you back up here
6 in a few minutes.

7 MR. PERUTO: Judge, my office has been in
8 contact with Mr. Durkin. As a matter of fact, we just spoke
9 again today. I understand how he arrived at the guideline
10 calculation which we respectfully disagree with. We believe
11 that they can be grouped and that his original calculation
12 was correct on the 70-to-87 month calculation.

13 THE COURT: Well, explain to me. Explain to
14 me why you think they can be grouped. This is not an
15 insignificant amount.

16 MR. PERUTO: Yes, I know. Judge, the guidelines
17 go back and forth. I understand there are specific language
18 on this because there were four marshals. But also, it's
19 one criminal episode. If it was 100 marshals, it wouldn't
20 be calculated any differently than one criminal episode.
21 It's how many people were trying arrest him would not,
22 should not affect the guideline calculation.

23 THE COURT: What guideline provision are you
24 relying on?

25 MR. PERUTO: The basic offense level of the --

1 I'm looking at the language, which I didn't bring my book
2 but I'm looking at the language and the basic calculation
3 where --

4 THE COURT: Hold on a minute. I'm happy to lend
5 you this. Why don't I have the courtroom deputy hand this
6 to you, if it would be of assistance to you.

7 (Sentencing guidelines book passed back.)

8 MR. PERUTO: And I apologize. I was on trial
9 and I sent a letter saying I couldn't look this up. I
10 didn't have enough time.

11 THE COURT: That's all right, Mr. Peruto. I
12 know this is important to you and your client. I'm happy to
13 take the time here that you would like to have.

14 (Pause.)

15 THE COURT: If it's of any assistance to you,
16 let me just mention that Section 3D1.4 is the multiple count
17 adjustment section used in the presentence report.

18 MR. PERUTO: That's the page I'm on, judge.

19 THE COURT: All right.

20 MR. PERUTO: The 3A1.4 seems to indicate that it
21 cannot be grouped. That's conceded.

22 THE COURT: Yes.

23 MR. PERUTO: I'm looking at the general. When I
24 was looking at the Base Offense Level, my argument is it
25 wouldn't matter how many marshals were involved.

1 THE COURT: All right. So let me make sure I
2 understand. I'll reflect this back to you. It's not -- you
3 are not relying on a specific guideline section but on a
4 general principle as you have just articulated it, that one
5 episode as you have described it or criminal event should be
6 treated as amenable to grouping. Have I understood you
7 right?

8 MR. PERUTO: Yes, sir.

9 THE COURT: Okay. Thank you. I'll go ahead and
10 take back my book, if you are willing to give it back. And
11 I'll ask the Government, Mr. Andrews, if you would please
12 respond to this argument.

13 (Sentencing guideline book passed forward.)

14 MR. ANDREWS: Your Honor, I'm looking at -- I
15 don't know whether you have the 2005 book in front of you
16 but I'm looking at page 338 which is under Section 3D1.2,
17 and it says groups of closely related counts and it has two
18 lists. One offense is covered by the guidelines that are
19 to be grouped and one they're specifically excluded. And
20 under specifically excluded, the first thing listed is all
21 offenses in chapter two, part A, which is the assault
22 provisions that are at issue in this case.

23 Further, when I had provided the case to the
24 U.S. Probation Office, United States vs. Johnson, which is
25 at 931 F2d 238, and that involved the armed robbery of three

1 Assistant U.S. Attorneys so I had a particular interest in
2 the case. That occurred in Newark, New Jersey. And I
3 haven't looked at the case for awhile, but basically the
4 part that I think that I've got in front of me that is
5 highlighted in yellow talks about applying the section 3D1.2
6 procedure to the facts of this case. The assault of the
7 three Assistant U.S. Attorneys are treated as distinct
8 groups because they involve different victims. And I think
9 the case is perhaps more complex so I may be glossing over
10 it a little bit, but I thought this was pretty much directly
11 on point.

12 And, essentially, it's the same thing here.
13 You have an assault on four U.S. Marshals. They're each a
14 separate victim and so they should be treated as distinct
15 groups. So I believe not only is the guideline fairly
16 specific but I believe the case law supports that
17 interpretation.

18 THE COURT: Okay. Mr. Peruto, I don't know
19 whether there is anything you want to add above that and if
20 not, we'll move to what, if any, other issues you want to
21 raise.

22 MR. PERUTO: Just in 10 seconds, judge. When
23 you rob somebody, it's an intentional act. You see your
24 victims, you know who it is and you are going to rob them.
25 If there are five people there, that's five counts of

1 robbery. But in this particular case, if a hundred marshals
2 came to arrest him ... you know the rest of my argument.

3 THE COURT: Okay. Yes. Any other points with
4 respect to either the factual or legal issues addressed in
5 the presentence report?

6 MR. PERUTO: Well, you heard the defendants'
7 testimony, judge. The discharge of the weapon had nothing
8 to do with him and it was discharged, and you saw where it
9 landed with the physical evidence where it was pointing, and
10 it went out straight which means it would have to be on the
11 ground. So it was a factual thing. He denied he had
12 anything to do or his hands were not on the rifle when it
13 was discharged. And I understand he is getting a five level
14 enhancement because that rifle was discharged. It had
15 nothing to do with the case at bar, but I understand to the
16 victor goes the spoils so I'm just making the objection.

17 THE COURT: Okay. Is there anything else?

18 THE DEFENDANT: No, not on the calculations.

19 THE COURT: Okay. Mr. Andrews, with respect to
20 the discharge of the weapon.

21 MR. ANDREWS: Your Honor, as you know, I wasn't
22 at the trial. I did talk to the marshals beforehand and my
23 belief is that the trial testimony and the trial verdict
24 pretty much established that the gun went off while the
25 defendant was reaching for it and that he caused it to go

1 off and, therefore, I think the guideline applies.

2 THE COURT: Okay. Well, I don't know.

3 Mr. Peruto, again I'll give you the last word, if you want
4 it.

5 MR. PERUTO: (Stands up and sits back down,
6 indicating no.)

7 THE COURT: Okay. Mr. Peruto is indicating he
8 doesn't have anything he wants to add, so I'll go ahead and
9 rule on these two points.

10 First, as to the grouping, I think I understand
11 the policy argument that you have made, Mr. Peruto, but the
12 guidelines are very explicit. 3D1.2d tells me I'm not to
13 group these counts. And that is a product of the reflection
14 of the Commission, and the rationale to that is as has been
15 described with counsel for the Government and is essentially
16 that which is laid out in the case that the Government has
17 cited here today. So I'm not grouping the counts.

18 I accept the calculations as set forth in the
19 presentence report, and including the calculation associated
20 with the discharge of the weapon. Given the verdict of the
21 jury and the evidence which I, myself heard at least to a
22 preponderance of the evidence, I conclude that that weapon
23 was discharged as a result of and as a direct consequence of
24 the struggle which was going on between the marshal and the
25 defendant. I should say the particular deputy marshal who

1 was involved in that struggle with the defendant. And so
2 that five level increase is applicable by the terms of the
3 guideline, itself.

4 So on the basis of those decisions, let me say
5 that I believe the presentence report is correct in
6 reflecting a Total Offense Level of 29 and a Criminal
7 History Category of I today.

8 Now, having said that, I should also note that
9 the guideline range that yields is 87-to-108 months. And I
10 will now hear you, Mr. Peruto, and your client for any
11 comments that you want to make.

12 MR. PERUTO: May it please the Court, I'm not
13 going to call them individually as witnesses but I would
14 like the record to reflect. And when I call their name, I'd
15 ask them to stand.

16 Matilda Lora, the defendant's mother.

17 Brendan Alberto Carrera, the defendant's nephew.

18 Tanya Lora, his sister.

19 Brigese Lora, his sister-in-law (phonetic).

20 And, Ernesto Lora, his brother. His oldest
21 brother.

22 You can all sit down.

23 I want the record to reflect that you may have
24 recognized them when they came up. Some of them were here
25 for all of the proceedings. Some of them were here for the

1 last day.

2 THE COURT: I certainly recognize some of them
3 and their names from the letters, which I received and which
4 I have had a chance to look at. I want to assure the family
5 I've had a chance to see the things they sent to me. All
6 right?

7 MR. PERUTO: Judge, if I may, Ernesto just
8 wanted to address you briefly on this matter, if he could.

9 THE COURT: All right. I'll hear from him.

10 MR. LORA: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. LORA: This is a moment that I never had,
13 but this is an opportunity for a new life for my brother.
14 That gentleman that is sitting there could be an honor to me
15 and my father, could be a good man in society. It was wrong
16 for him flee, I believe in that, but what he has done, okay,
17 in the past. He has his friends to come here and tell you
18 that he is innocent.

19 THE COURT: Okay. All right.

20 MR. LORA: And one last thing is I know my
21 brother did not do what he was being charged, what he is
22 being here, just as simple as that. His four -- the four
23 marshals are in their houses. There is no injury, with no
24 expense of medical, and that is very important to see. And
25 if my brother touch that pistol that they say that was

1 discharged, they would have shot my brother. I guaranteed
2 you that. Anybody that reaches an arm here in the United
3 States is directly going to get shot, no matter what. And I
4 believe in my brother 100 percent, because we are taught as
5 a family in this country, where we have 40 years that we're
6 all United States American citizens. And that's the only
7 thing that I want to tell you. Just look at him. We all
8 have families here. There's always -- like America, there's
9 always an opportunity. Thank you, Your Honor.

10 THE COURT: All right.

11 MR. LORA: Thank you, Your Honor.

12 THE COURT: All right.

13 MR. PERUTO: Judge, I do have a few remarks.
14 This defendant is not an American citizen. He didn't know
15 that himself, which is the ironic twist here. He thought he
16 was born in New York City. As it turns out, he was three
17 months old when he came to this country but he has obviously
18 no way of knowing that. Never applied for citizenship.
19 Never knew that he was a foreigner. He has no contacts
20 whatsoever with the Dominican Republic. He doesn't know
21 anybody there. Yet there is an immigration detainer on him
22 and he is going to be deported, we all know that, and there
23 is nothing that this Court can do about that. No matter if
24 you give him probation or you give him a million years,
25 there is nothing that is going to affect that.

1 It's just ironic whatever punishment he serves
2 here, he is then banished to the Dominican Republic, which is
3 more punishment than any of us can envision, including him.
4 I would ask that you take that into consideration. You know
5 that the guidelines are advisory. It's a strong advisory
6 but they're advisory. He is going to be deported. If his
7 family wants to join him, that is on them, and Your Honor
8 knows that. But it's an added punishment because of those
9 three months time where he believes he was born in New York
10 but there is no paperwork to prove it. Matter of fact, the
11 paperwork seems to indicate otherwise, and that is what I'm
12 told by the immigration lawyer, that it's a losing case, so
13 I want Your Honor to keep that under distribution.

14 Secondly, there were no injuries here. We're
15 not here to relitigate the case and you know that. And I
16 tried to tell the defendant today is not the day to
17 relitigate this case. But there were no injuries. The pit
18 bulls did not attack anybody but each other. The pit bulls
19 were put in a room. They attacked each other, if you
20 remember. They were injured somewhat themselves.

21 THE COURT: Well, I remember hearing testimony a
22 little bit differently than that, but I certainly understand
23 that that is the defendant's perspective on the evidence.

24 MR. PERUTO: Nobody was injured except the
25 defendant. I think there was a great deal was made out of a

1 minor scratch that was on one of the hands of one of the
2 marshals, so I know that this Court would give a more severe
3 sentence if any of them were in fact injured. I believe
4 that the marshal himself in this particular case was not
5 trying to exaggerate what happened and he was trying to be
6 as candid as possible. And this defendant testified that it
7 was his observation that two of the marshals were excessive
8 and two of them were trying to help him, especially the
9 marshal. I don't know what sense that would make unless he
10 really felt that way, that two of them were overreacting.
11 And the marshal himself I believe was the last Government
12 witness. The defendant didn't have much of a quarrel with
13 he had to say, if Your Honor will recall. The trial wasn't
14 that long ago.

15 I will ask to you take all of this into
16 consideration. The guidelines are severe, especially in
17 light of the deportation. He knows he -- I mean his life,
18 it's just been ridiculous. To walk away from the supervised
19 release problem in Rhode Island and to turn it upside down
20 for a few months is totally ridiculous, and it's just one
21 thing that compounded itself, compounded itself, compounded
22 itself to where we're now here. It's a real snowball
23 effect.

24 I believe the defendant wants to address you
25 before sentencing and that's all the remarks I would like to

1 say.

2 THE COURT: All right. Mr. Lora-Pena, if you
3 would come forward again, sir. You don't have to say
4 anything, but if you would like to say something, now is
5 your opportunity to do it, sir, and I'm happy to hear you.

6 THE DEFENDANT: Thank you, sir.

7 I'm nervous, Your Honor.

8 THE COURT: That's all right.

9 THE DEFENDANT: Can I address the Court about my
10 PSI? May I, please? Just a little article? Is that okay?

11 THE COURT: You know what? This is an important
12 day for you and I'm ready to hear what you would like to
13 say.

14 THE DEFENDANT: Thank you, Your Honor. I'm a
15 little nervous.

16 You got the same paperwork, right, Your Honor.

17 THE COURT: I do.

18 THE DEFENDANT: Can you look at number 40,
19 please?

20 MR. PERUTO: He is referring to paragraph number
21 40, judge.

22 THE COURT: Okay. I have that in front of me.

23 THE DEFENDANT: The first PSI, the first paper,
24 on November the 17th.

25 THE COURT: I'm sorry. I have the revised one,

1 the December 20th one. If you want to wait just a moment,
2 we'll see if I can put my hand on that.

3 THE DEFENDANT: Yes, please.

4 MR. PERUTO: I didn't know he was going to refer
5 to that one, judge. I have mine.

6 (Documents passed forward to Court.)

7 THE COURT: All right. The presentence officer
8 was kind enough to give me a copy of the November 17th
9 version of this report so I'm now looking at page eight,
10 paragraph 40 of that document.

11 Go ahead, if you would like, Mr. Lora-Pena.

12 THE DEFENDANT: It says Nelson Lora-Pena was
13 born on August the 2nd, 1996.

14 THE COURT: It appears to be a typographical
15 error.

16 THE DEFENDANT: That would make me 10 years old.
17 10. So that means to say the marshals been looking for a
18 kid since he was two years old. Right?

19 THE COURT: Well --

20 THE DEFENDANT: This is the Government.

21 THE COURT: That would be the case I guess if I
22 were inclined to look at a typographical error and give it
23 much credence but I'm not.

24 Is there anything else about the presentence
25 report?

1 THE DEFENDANT: So I mean this kid is not me.
2 And look at number 34, please.

3 THE COURT: Okay.

4 THE DEFENDANT: According to court record
5 document, on July 6th, 1972, the defendant presented an
6 application for passport in the name of Buboïs B. Aviles.

7 July the 6th, 1972. That makes me six years
8 old.

9 THE COURT: All right.

10 THE DEFENDANT: I just wanted to prove a point
11 here.

12 THE COURT: All right. Is there anything else
13 you want to point to in the presentence report or this
14 earlier version of it?

15 THE DEFENDANT: Your Honor, I admit that I'm
16 in for 10 years. I'm in for 10 years. I'm human. Humans
17 make mistakes. I admit to that. But I'm tired of getting
18 in trouble, constantly influenced by friends. I wasn't
19 trying to get in trouble, trouble always haunt me. If you
20 can see my records, I pled guilty to everything that I have
21 done because I admit that I did it. But in this case, how
22 was I going to plead guilty to something I haven't done and
23 I am still innocent. I know I am. And you just said
24 yourself -- number seven. Would you look at seven, please,
25 sir?

1 THE COURT: Sure. Go ahead.

2 THE DEFENDANT: I'm sorry. 16.

3 THE COURT: All right. Mr. Lora-Pena, I have it
4 in front of me.

5 THE DEFENDANT: I'm sorry. I'm just a little
6 nervous.

7 It says by virtue of evidence presented in
8 trial, the defendant was responsible for grabbing at the
9 marshal's shotgun and cause it to discharge. And at the
10 end, I'll make it short, it says based on information. Your
11 Honor, I'm trying to ask myself this question. What is
12 justice about? Justice about the truth. I'm asking, is it
13 about the truth?

14 THE COURT: Well, I'm not here to answer your
15 question. I'm here to hear what you would like to say, sir,
16 so if there is something you want to say, go ahead.

17 THE DEFENDANT: I'm just asking because it says
18 information. I thought justice was about the truth. I'm
19 asking you, Your Honor. You just said it yourself. You
20 heard the evidence. What evidence? What evidence is
21 information? It was saying information that he said.
22 Basically I'm accused by, he say, information. Where is it?
23 Where is my fingerprints on the weapon? Where is it? No
24 fingerprints, nothing. Just by information?

25 That is one thing the TV teaches you a lot.

1 Teaches you so much. TV is knowledge and you learn so much.
2 That's all I did was watch TV, and I was watching last week.
3 It came to my attention. I watch Numbers. Numbers about
4 how Federal Bureau of Investigation, they investigate crime
5 scene investigation. How can I be convicted of a crime,
6 there is no evidence? Where is it? Where? Where is my
7 fingerprints? Where is my gun powder? Where is the
8 analysis? If you can find my fingerprints on that weapon,
9 I will plead guilty to that. And you can charge to that
10 crime whatever the guidelines come into that crime. Where
11 is it? Where? This is information. Basically, this court,
12 this trial is about he say. This is about the truth.
13 That's what I'm trying to figure this out. Information.
14 Where is it?

15 Look at my face, Your Honor. I'm scarred for
16 life. Look at my face. I'm scarred for life. Look at my
17 face. My appearance is different. My teeth is chipped.
18 Sometimes I pee blood, I piss blood. My health is not -- my
19 health is not right. I need to see a doctor. Mentally, I'm
20 not okay, you know, because the marshals could have --
21 agents, trained agents, trained agents, official agents,
22 they could have handled that. They could have handled that
23 better. These are trained agents.

24 My cousin was in the Marines for six years. He
25 was an E-3, a lance corporal, and you mean to tell me I

1 could have taken that weapon? There is no way. He was
2 trained for combat. And I know it's a fact, it's fact. You
3 show me those fingerprints and the gun powders -- the gun
4 powder. Did I shoot that weapon? I will plead guilty to
5 it. I did not touch that weapon. I didn't. But based on
6 information? That is not justice. That is not the truth.
7 That is information.

8 And that's -- if I would had done it, when my
9 first lawyer came to me, and I took the plea for 33
10 mandatory, I would have took it because I would have done
11 it, but I didn't do it. I haven't done nothing. Look at my
12 face. I'm scarred for life. Why? Why I have to pay for
13 something they did to me? I got brutally beaten, throw me
14 in jail for nine, almost nine months. For what? Because
15 of what they demonstrate? That's justice? That is not
16 justice. What I'm asking, justice to be served today.

17 Where is his medical bills? Where is the
18 medical bills? Why didn't he go to a doctor? For all he
19 knows, I had hepatitis, HIV. Nothing like that. Nothing.
20 It's all about information.

21 THE COURT: All right. Mr. Lora-Pena, I think I
22 have your position. Is there anything other than contesting
23 your innocence, which I hear you?

24 THE DEFENDANT: Nothing, Your Honor. I just
25 want the truth. That's all, Your Honor.

1 THE COURT: All right.

2 THE DEFENDANT: Please, I'm begging. I'm
3 begging. The only hope I have is you. You're the only one.
4 I'm asking for hope and mercy. It seems like the whole
5 world is coming down like I'm the baddest guy in the world.
6 I didn't get in trouble for ten years. I don't want no more
7 trouble. I don't, Your Honor. Find the way in your heart,
8 please, to forgive me. I know the Government is mad because
9 I ran for 10 years. I don't want no more trouble. I just
10 want to be with my family. I said I'm 40 years old. I know
11 from right and wrong. I know I can be a better person. I
12 know I can. Please.

13 THE COURT: All right.

14 THE DEFENDANT: Forgive me.

15 THE COURT: I've heard what you had to say.

16 Thank you.

17 Mr. Lora-Pena and Mr. Peruto, go ahead and be
18 seated.

19 Mr. Andrews, the sentencing position on behalf
20 of the Government.

21 MR. ANDREWS: Your Honor, basically we recommend
22 the sentence within the guideline range. I think one thing
23 that is important to note is in the presentence report, as a
24 result of Mr. Lora-Pena's conduct, someone could have been
25 killed that day and that "someone" could have been him or

1 it could have been one of the marshals or other law
2 enforcement officers who were at the scene. He caused the
3 gun to discharge and he could be facing -- so, in fact,
4 the injuries that the marshal suffered was fairly
5 inconsequential but his conduct was extremely serious
6 because it could have resulted in much more serious injury
7 than it did.

8 THE COURT: And would you agree that that is
9 captured at least in part in the functioning of the
10 guidelines with the addition of the five points for the
11 discharge of the weapon and the lack of grouping?

12 MR. ANDREWS: I believe it is, Your Honor.

13 THE COURT: All right. Let me explain to you
14 how we're going to proceed from this point, Mr. Lora-Pena.
15 I'm going to talk to you about the sentence I intend to
16 impose. I'll state the sentence I intend to impose. I'll
17 give your and the attorney for the Government an opportunity
18 to tell me if there is any reason why that sentence as
19 stated ought not be imposed, and if there isn't a legal
20 reason that we have already covered, why it ought not be
21 imposed, I'll go ahead and order it imposed as stated.

22 First, I'll take a moment to speak directly to
23 your family who are in the courtroom and who took the time
24 to write letters on your behalf.

25 It's evident that whatever else, good or bad has

1 happened to you in your life, you have been lucky enough to
2 have a supportive family unit. Not everybody is blessed to
3 have that. They need to understand, though, what we're here
4 to do today and so do you.

5 You continue to contest your innocence. Your
6 brother who I permitted to speak contests your innocence as
7 well. It may be that you persuade an appellate court that
8 there was some flaw in the trial proceeding itself that
9 requires the evidence to be looked at anew. You have
10 appellate rights which I will mention to you at the close of
11 this. But today is, as your own lawyer has aptly put it,
12 not a day to talk about guilt or innocence because a jury
13 has spoken on that issue. And it said, after hearing the
14 evidence, you're guilty of the offense. So I'm not at
15 liberty to ignore that verdict.

16 And I sat through the trial myself. And I heard
17 the evidence myself. And I don't think that the jury went
18 amiss. It sounded to me like you fled. You're used to
19 living as a fugitive and you preferred to live as a fugitive
20 than to live in jail and that as a consequence of your
21 decision to flee, there was a fight. Your dogs, attack dogs
22 were in the melee for awhile. The gun was discharged. And
23 it is only by the grace of good fortune, in a series of
24 events that could be called very sad and unfortunate for
25 you, it's only by good fortune that no one was hurt more

1 badly than they were.

2 I understand your statements here today that you
3 certainly feel like you were injured. And that is a most
4 unfortunate thing. That out of all of this event, your
5 focus is, continues to be thoroughly and entirely and
6 totally upon yourself. So I don't know anything that I can
7 say here today will help you understand this sentencing
8 process any better, but I'm taking a shot at it anyway.

9 In our society, we have to abide by certain
10 basic norms, and among those norms are a respect for people
11 who operate, work in law enforcement and help keep the rest
12 of us free and safe. I'm going to be dealing with a
13 sentence for you on the supervised release violation. I'll
14 be talking about that in a moment as well.

15 It was obviously a serious mistake for you to
16 flee Rhode Island and violate your supervised release. But
17 when you were found, lo these many years later, the offense
18 was made tremendously worse by the decision to put law
19 enforcement officers at risk. That's something that our
20 society cannot tolerate. And that's why you face a
21 significant period of incarceration for this offense. It
22 can be accepted, and it won't be accepted.

23 So I'm going to sentence you within the
24 guideline range. I'm going to sentence you toward the lower
25 end of that range, not because I take lightly what you did

1 but because it's a severe range. At a minimum, you've got
2 87 months in front of you for this offense. The guideline
3 policy statements tell me that the supervised release
4 violation should be added consecutively. So if I do, that
5 the minimum you are facing is 92 months in prison. And then
6 when that is all done, in all likelihood, as your attorney
7 has said, you face deportation.

8 So even at the lowest end of the guideline
9 range, you face very severe consequences. And since I
10 believe that those consequences are warranted, this is the
11 sentence I intend to impose:

12 On the supervised release offense, a term of
13 five months, which I will get to in greater detail in a
14 moment.

15 On the offense of conviction in this case,
16 pursuant to the Sentencing Reform Act of 1984, it is the
17 judgment of the Court that the defendant Nelson Lora-Pena is
18 hereby committed to the custody of the Bureau of Prisons, to
19 be imprisoned for a term of 87 months on each of counts one
20 through three and 12 months on count four, all counts to be
21 served concurrently.

22 Upon release from imprisonment, the defendant
23 shall be placed on supervised release for a term of three
24 years. This term consists of terms of three years on each
25 of counts one through three and one year on count four, all

1 such terms to run concurrently.

2 Within 72 hours of release from the custody of
3 the Bureau of Prisons, the defendant shall report in person
4 to the Probation Office in the District to which the
5 defendant is released.

6 While on supervised release, the defendant shall
7 not commit another federal, state or local crime, shall
8 comply with the standard conditions that have been adopted
9 by this Court and shall comply with the following additional
10 conditions:

11 The defendant shall not illegally possess a
12 controlled substance.

13 The defendant shall not possess a firearm or
14 destructive device.

15 The defendant shall cooperate in the collection
16 of DNA as directed by the probation officer.

17 In addition, the defendant shall comply with the
18 following special conditions:

19 The defendant shall participate in a drug
20 aftercare treatment program at the direction of the
21 probation officer which may include testing.

22 If deported, the defendant's term of supervised
23 release shall run inactively as long as he remains outside
24 the United States. Should he reenter the United States
25 illegally after deportation, such actions shall be

1 considered a violation of supervised release.

2 I find that the defendant does not have the
3 ability to pay a fine and will waive the fine in this case.

4 It is further ordered that the defendant shall
5 pay to the United States a special assessment of \$325 which
6 shall be due immediately.

7 Now, as to that sentence as stated, let me ask,
8 Mr. Peruto, is there any legal reason why that sentence as
9 stated ought not be imposed?

10 MR. PERUTO: No, sir.

11 THE COURT: All right. Mr. Andrews?

12 MR. ANDREWS: Not that I know of, Your Honor.

13 THE COURT: All right. I also state that a five
14 month term of imprisonment is imposed on the supervised
15 release, as I mentioned earlier, to run consecutive to the
16 term of imprisonment imposed under docket number 05-Criminal
17 Action-47-KAJ.

18 No term of supervised release will follow that
19 term of imprisonment since the defendant will be on
20 supervised release for a new offense.

21 Do you have any legal reason why that sentence
22 ought not be imposed, Mr. Peruto?

23 MR. PERUTO: No, sir.

24 THE COURT: Mr. Andrews?

25 MR. ANDREWS: No, Your Honor.

1 THE COURT: All right. Then I order those
2 sentences imposed as stated.

3 Now as I mentioned earlier, Mr. Lora-Pena, you
4 have appellate rights. I'm going to put what I've talked to
5 you about here today into a written document called a
6 Judgment and Commitment Order. It might take a few days for
7 me to get that filed, but as soon as it's filed, once it's
8 filed, you have 10 days. The clock starts to run and you
9 have 10 days within which to file a notice of appeal. If
10 you want to take this up to the Third Circuit, which is the
11 Court of Appeals over this Court. And I'm sure that
12 Mr. Peruto will be speaking to you about that further, if
13 you would like.

14 All right. Is there anything further to come
15 before the Court at this time? Mr. Andrews?

16 MR. ANDREWS: No, Your Honor.

17 THE COURT: Mr. Peruto?

18 MR. PERUTO: Yes, sir. Judge, the defendant is
19 indigent. He can file whatever papers the Court requires of
20 him but he does not have the wherewithal to obtain the
21 transcripts and to file the necessary fees and for counsel,
22 so we would ask that those steps be taken to obtain an
23 affidavit from him of indigency so he could qualify.

24 THE COURT: Certainly if that paperwork is filed
25 and it's in order, you can be assured that the necessary

1 steps will be taken. Now, I tell you candidly, sitting
2 here, I don't know whether he files that here or in the
3 Court of Appeals, but wherever it's supposed to go, I'm sure
4 you will have to make sure it gets to the right spot, and it
5 will be acted on accordingly. All right?

6 MR. PERUTO: Yes, sir.

7 THE COURT: All right. We stand in recess.

8 (Sentencing hearing ends at 3:55 p.m.)
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